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In the Supreme Court
OF THE
United States

OCTOBER TERM, 1975

No. 75-1403

WILLIAM J. DIRK,
Petitioner,

vs.

AMERICAN PRESIDENT LINES, LTD., a corporation,
Respondent.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI to the Court of Appeal of the State of California, First Appellate District, Division Two

GRAYDON S. STARING,
Two Embarcadero Center,
San Francisco, California 94111,
Telephone: (415) 421-4600,
Attorney for Respondent.

ROBERT MCGROUTHER, JR.,
GARY P. SNYDER,
LILLICK MCHOSE & CHARLES,
Of Counsel.

PERNAU-WALSH PRINTING CO. - 562 MISSION STREET - SAN FRANCISCO, CA 94105

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For the following reasons, Respondent opposes the petition for a writ of certiorari filed herein.

NO SUBSTANTIVE ISSUE IS PRESENTED FOR REVIEW

By tortured interpretation of the opinion of the California Court of Appeal for the First Appellate District, Petitioner sets out a "Question Presented for Review"

which not only lends itself to an answer so obvious that, in itself, the "Question Presented for Review" must necessarily be misstated by Petitioner, but also implies that California courts have historically been applying a "more stringent" State standard of evidentiary sufficiency in Jones Act cases than the rule announced by this Court in *Rogers v. Missouri Pacific Railroad Co.*, 352 U.S. 500 (1957).

Both Respondent and California courts (*Waller v. Southern Pacific Co.*, 66 Cal. 2d 201, 57 Cal. Rptr. 353 (1967); *Mortensen v. Southern Pacific Co.*, 245 Cal. App. 2d 241, 53 Cal. Rptr. 851 (1966); *Najera v. Southern Pacific Co.*, 191 Cal. App. 2d 634, 13 Cal. Rptr. 146 (1961)) agree with Petitioner that where a question of causation is presented in a case under either the Federal Employers' Liability Act or the Jones Act, in testing the sufficiency of the evidence to support a judgment in favor of the plaintiff employee which turns on a question of causation, a California court is bound by the rule of evidentiary sufficiency enunciated in *Rogers v. Missouri Pacific Railroad Co., supra.*

The dispute between Petitioner and Respondent, as developed in the course of briefing in Petitions and Answers thereto presented not only to the California Court of Appeal for the First Appellate District but also to the California Supreme Court, is whether the Opinion of the Court of Appeal is a discussion and decision concerning the causation element in a Jones Act cause of action (as Petitioner through a tortured interpretation of the Opinion contends) or a discussion and decision concerning whether there was any failure on the part of the

respondent shipowner to meet its obligations to the seaman Petitioner under applicable standards. Respondent believes it to be the latter based upon a reading of the Opinion in its entirety. Both the Court of Appeal itself and the California Supreme Court have denied the seaman's petitions presenting this question and are evidently satisfied that what the Court of Appeal was discussing was the existence of the improper condition claimed by the seaman. If, as the Petitioner contends, the opinion dealt with causation, either court would most certainly have taken the opportunity, in dealing with the Petitions presented, at least to mention what standard applied if the opinion was intended to treat the issue of causation under the Jones Act.

At any rate, the question of how an unpublished opinion of a California Court of Appeal should be interpreted is clearly not of such significance as to either qualify for or justify a hearing before this Court.

THIS CASE CONCERNS WHETHER THE SHIPOWNER CONFORMED TO THE STANDARD REQUIRED BY LAW AND IS NOT CONCERNED WITH CAUSATION

In order to make the tortured interpretation of the opinion which is necessary in order for Petitioner to treat it as dealing with causation rather than with the legal standard of care which the shipowner owes to the seaman, Petitioner extracts from the lengthy opinion of the Court of Appeal the statement that "the sole issue is whether defendant's [*sic*] fall was the result of the unsafe condition of the ladder." (Petition, p. 5.) The

opinion in its entirety makes clear, however, that the Court of Appeal was considering whether the evidence was sufficient with respect to each problem encompassed by this statement, commencing with a determination of whether the evidence was legally sufficient to prove that the ladder where Petitioner fell was unsafe. The sentence immediately preceding this out-of-context quote indicates that the Court of Appeal was aware that the issue which was relevant to both the unseaworthiness and the negligence causes of action was whether Petitioner had proved a failure by the shipowner to satisfy the legal standard of care, *i.e.*, whether Petitioner had proved the existence of a dangerous condition:

> Defendant also points out that the plaintiff's burden of proving unseaworthiness is a lesser one, since he need not establish the defendant's knowledge of the dangerous condition. (Appendix A to Petition, p. 7.)

The Court of Appeal elected to discuss only unseaworthiness and elected not to separately discuss negligence because the Court was *not* analyzing causation, as to which different standards apply in an unseaworthiness claim than in a Jones Act claim. The Court was analyzing the evidence with a view toward determining whether or not there was a dangerous condition (Appendix A to Petition, p. 7.) The Court correctly pointed out in its opinion that if the evidence was legally sufficient to establish that the ladder where Petitioner fell was unsafe at the time he fell, the verdict could then be upheld on an unseaworthiness theory and, accordingly, a separate analysis of negligence, with its different rules respecting notice and causation, was unnecessary (Appendix A to Petition, p. 7).

While the Opinion (Appendix A to Petition) should certainly be read in its entirety rather than in out-of-context portions, a recitation of a few sample quotations illustrates that the Court of Appeal was analyzing whether the evidence was legally sufficient to prove that the ladder was dangerous. At one point the Court of Appeal said:

> There was no testimony by plaintiff or by anyone else that the absence of anti-skid material and the worn condition of the diamond-treads *rendered the ladder unsafe* under ordinary conditions. (Appendix A to Petition, p. 9, emphasis added.)

Clearly by this statement the Court of Appeal was considering not causation, but the question whether the evidence was sufficient to show an unsafe condition of the ladder. Another example is the following:

> Thus, the *Wiseman* case appears to be controlling of this case and furnishes direct authority for the proposition that the evidence produced by the plaintiff herein was insufficient as a matter of law to establish defendant's liability. (Appendix A to Petition, p. 11.)

Like this case, *Wiseman v. Sinclair Refining Co.*, 290 F.2d 818, 1961 A.M.C. 1594 (2d Cir. 1961), *cert. den.*, 368 U.S. 837, involved the question whether the evidence of record was sufficient to prove that a step was unsafe. Like this case, *Wiseman* involved questions of both unseaworthiness and negligence and, specifically, concerned the sufficiency of the evidence to prove whether a shipowner had breached a duty to provide a safe ladder. The Court of Appeal, by distinguishing the *Wiseman* case from *Barboza v. Texaco, Inc.*, 434 F.2d 121, 1971 A.M.C. 405 (1st Cir. 1970), flatly stated that the issue in this

case, as in *Wiseman,* was the sufficiency of the evidence to prove a dangerous condition:

> The situation in the *Barboza* case was thus one where it was undisputed that there was a particular substance on the stairs which rendered them slippery and unsafe and which caused the plaintiff's fall. There was also evidence that it was not the plaintiff, but someone else, who had caused the substance to be on the stairs. The instant case is totally dissimilar, in that there was no evidence to show plaintiff's fall was in fact a result of *any foreign substance or other unsafe condition of the ladder.* (Appendix A to Petition, p. 12, emphasis added.)

The circumstance that the Court of Appeal in writing its Opinion occasionally found it necessary to use the word "result" or "cause" in order to make intelligible sentences in the English language does not mean that the decision itself turned upon the question of causation. A thorough review of the Court's Opinion clearly shows that the decision was based upon a determination that there was insufficient evidence to establish that Respondent had breached a duty owed to Petitioner: specifically, the duty to provide a safe (*i.e.,* seaworthy) ladder.

The issue in this case, correctly discussed and decided by the Court of Appeal, was not causation but whether the evidence established any breach of duty on the part of Respondent.

THE CALIFORNIA COURT APPLIED FEDERAL LAW AND NOT ANY SPECIAL STATE STANDARD OF EVIDENTIARY SUFFICIENCY

Contrary to Petitioner's contention that the Court of Appeal applied a unique California standard of evidentiary sufficiency (Petition, p. 5), in fact the Court of Appeal relied entirely upon Federal authorities in analyzing the sufficiency of the evidence. (Appendix A to Petition, pp. 7-13.) This method of analysis in relying wholly upon Federal authority in a seaman's personal injury case is typical of the method of analysis used by California courts. See, for example, *Foss v. Oliver J. Olson & Co.,* 250 Cal. App. 2d 44, 58 Cal. Rptr. 511, 1967 A.M.C. 2097 (1967) and *Peterson v. Permanente S.S. Corp.,* 129 Cal. App. 2d 579, 277 P.2d 495 (1955).

First the Court of Appeal relies upon *Pope & Talbot, Inc. v. Hawn,* 346 U.S. 406, 418, 1954 A.M.C. 1, 13 (1953), wherein Justice Frankfurter, in a concurring opinion, stated: ". . . it will be rare that the circumstances of an injury will constitute negligence but not unseaworthiness." The Court of Appeal then discusses a specific application of this proposition in another fall case, where a jury's finding that the shipowner was negligent but the vessel was seaworthy was set aside as irreconcilably inconsistent. *Turner v. "The Cabins", Tanker, Inc.,* 327 F. Supp. 515, 1971 A.M.C. 1905 (D. Del. 1971).

In pointing out that where the shipowner's liability turns on whether or not a dangerous condition existed the seaman's burden in proving unseaworthiness is less than in proving negligence because only the condition

need be proved and not also the shipowner's knowledge of it, the Court of Appeal relies upon *Mitchell v. Trawler Racer, Inc.*, 362 U.S. 539, 1960 A.M.C. 1503 (1960). Finally, in holding that the evidence produced by Petitioner was insufficient as a matter of law to establish Respondent's liability, the Court of Appeal did not rely on any California case, but rather upon the Second Circuit case of *Wiseman v. Sinclair Refining Co., supra.*

Thus, Petitioner's claim that California courts are not following Federal rules of evidentiary sufficiency is completely contradicted not only by other California cases, but also by this very case. Thus, there has been no deviation from proper evidentiary standards by the California courts and, accordingly, there is no need for review by this Court to correct any nonexistent "deviation".

CONCLUSION

California courts have observed Federal authority in determining standards of evidentiary sufficiency in Jones Act cases. This case is no exception. Petitioner's tortured interpretation of the unpublished Opinion of the California Court of Appeal in order to argue that it applies a unique California standard of causation sharply contrasts with a reading of the entire Opinion, which makes it clear that causation was not in issue. Therefore, the only "issue" concerns how the unpublished opinion should be interpreted. This bogus issue is clearly not an

issue of sufficient merit to justify a hearing by this Court. Accordingly, the Petition should be denied.

Respectfully submitted,

GRAYDON S. STARING,
Attorney for Respondent.

ROBERT MCGROUTHER, JR.,
GARY P. SNYDER,
LILLICK MCHOSE & CHARLES,
Of Counsel.

April 26, 1976.